

No. 47871-4-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

MARY YOKEL,

Appellant.

Appeal from the Superior Court of Washington for Lewis County

Respondent's Brief

JONATHAN L. MEYER
Lewis County Prosecuting Attorney

By: 
J. BRADLEY MEAGHER, WSBA No. 18685
Chief Criminal Deputy Prosecuting Attorney

Lewis County Prosecutor's Office
345 W. Main Street, 2nd Floor
Chehalis, WA 98532-1900
(360) 740-1240

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I. STATEMENT OF THE CASE

On February 15, 2015, Officer Buddy Croy arrested the defendant, Mary Yokel, at a motel in Centralia, Washington. RP 100. Yokel was arrested due to a municipal court warrant. RP 91. Croy Searched Yokel incident to arrest. RP 103. He found a Vicodin pill in Yokel's right hand pocket. RP 104. The Vicodin pill had hydrocodone in it. RP 154.

Pre-trial, the Defense sought to allow the Defendant to testify in the following manner:

Defense Counsel: "But as it relates to an offer of proof, my understanding of the facts is that on the day in question, she, my client, had taken two of the pills out of the medicine bottle for her daughter's prescription medication. She has a medical condition and she gave one to her daughter, didn't think she should take two, put the other on in her pocket and had it in her pocket ultimately when the police arrested her." RP 9.

The defendant's daughter was 17 years old, and going to college in another county. RP 6. The court denied the testimony that it was Yokel's daughter's prescription, and denied the theory that because Yokel's daughter obtained the pills by prescription, Yokel was somehow lawfully in possession of those pills. RP 10, 15, 17.

Defense Counsel: "We'd like to be able to put on the defense that she had a valid prescription for her minor daughter."

Court: "Well, you're not going to be allowed to." RP 17.

The Court noted that the pill was not in the prescription bottle, the defendant's daughter was not anywhere near the motel room where the defendant was arrested and that the defendant was in possession of another controlled substance. RP 17. The Defendant did not have her daughter's prescription for the controlled substance on her person on the date she was arrested and had the pill in her pocket. RP 9.

The defendant was nevertheless allowed to present an unwitting possession defense. CP 35. The instruction given to the Jury was WPIC 52.01. RP 173.

II. ARGUMENT

A. RCW 69.50.4013 MEANS THAT THE DEFENDANT HAD A CONTROLLED SUBSTANCE, BUT OBTAINED THE CONTROLLED SUBSTANCE FOR HIMSELF/HERSELF, PURSUANT TO A VALID PRESCRIPTION.

"It is unlawful for any person to possess a controlled substance unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of his or her professional practice, or except as otherwise authorized by this chapter." RCW 69.50.4013.

The merits of this appeal hinge on how the court reads RCW 69.50.4013. At some point, common sense has to play some role in

our thinking. The Appellant would have the court read this statute such that any person can possess a controlled substance, even if the prescription was for and to another person.

For example, person A goes to his doctor. The doctor prescribes hydrocodone, writes the prescription on a prescription pad, tears off the written prescription and gives it to A. A takes the written prescription he received from his doctor to a pharmacy. The pharmacist takes the written prescription, and sells the hydrocodone to A in the quantity and concentration written on the prescription A received from his doctor. The pills are sold in a container that clearly displays the name of A, the name of A's doctor, and the type and quantity of the medication. So far, so good.

But now B takes one of the pills out of the clearly labelled bottle and just sticks the pill in B's pocket. Nobody would say B is lawfully in possession of the hydrocodone notwithstanding the fact that A obtained the pills via a valid prescription. Yet this is the scenario the Appellant wants the court to adopt as a "lawful possession".

The law does not make exceptions for relatives. Defense counsel tried to argue to the court that a seven year old relies on his mother to dispense prescribed medication to him. RP 16. But the

court ruled correctly that this was not the circumstance that the officers found Ms. Yokel. Had the officers found Ms. Yokel in the proximity of her daughter, and if she had the pills in a clearly labelled pill bottle, with the prescription taped to the outside of the bottle, there may have been a different outcome. RP 17. It is clear to the State that what the legislature intended in RCW 69.50.4013(1) was to protect citizens who were in possession of their own medications, prescribed to them, and parents who were giving their child prescribed medications in the privacy of their own home. The protection was not for drug addicts popping pills and smoking methamphetamine in a motel room.

Judge Hunt correctly ruled that the proffered testimony was inadmissible. The defense was that the defendant's daughter obtained the pill via a valid prescription and that therefore the defendant's mother was lawfully in possession of it. RP 9. That strained reading of RCW 69.50.4013(1) would have confused the jury as to the correct interpretation of the statute.

Appellant lists twenty-one cases, the Washington State Constitution and the United States Constitution. Not one of these references support the Appellant's strained reading of RCW 69.50.4013(1). The facts in *State v. Brown* (cited on page 12 of the

Appellant's brief) are different than Ms. Yokel's. Brown was an inmate in a correctional facility. *State v. Brown*, 33 Wn. App. 843, 845, 658 P.2d 44 (1983). After a visit from his wife, Brown was discovered with two Valium pills. *State v. Brown*, 33 Wn. App. at 843. Brown tried to shift his burden at trial by requiring the State to prove that Brown did not obtain the pills via a valid prescription. *State v. Brown*, 33 Wn. App. at 848. The court denied that burden shifting and noted that Brown failed to meet his burden. *State v. Brown*, 33 Wn. App. at 848. There was no mention of Brown having obtained the pills via anyone else's prescription.

B. THE FACTS AS PROFFERED BY THE DEFENDANT DID NOT SUPPORT AN UNWITTING POSSESSION DEFENSE.

"A person is not guilty of possession of a controlled substance if the possession is unwitting. Possession of a controlled substance is unwitting if a person did not know that the substance was in her possession or did not know the nature of the substance." WPIC 52.01, CP 35.

The proffered testimony was that Yokel took the pill out of her daughter's prescription bottle and put it in her pocket. RP 9. She therefore knew what it was, and knew she had it.

Appellant argues in her brief that Yokel would have said "When she realized her daughter should not have the second pill,

she put it in her pocket.” Appellant’s brief, page 18. Appellant then takes the leap to say this testimony would somehow provide sufficient evidence for the jury to find that Yokel’s possession of the pill was inadvertent or unwitting at the time the police officers found it. Appellant’s brief, page 18. No reasonable juror would come to that conclusion.

When giving his proffer to the court, defense counsel did not proffer that the defendant forgot she had the pill on her person. Rather, what she was proffering was an explanation that she knew she had the pill, knew what it was, and was lawfully in possession of it because it was prescribed to her daughter. RP 9. That is inconsistent with an unwitting possession defense, but nevertheless the Court allowed the instruction. The defendant’s testimony was only limited in mentioning a prescription. RP 158.

Defense Counsel: “But the rub about that is she was talking about prescription. So we’re not going to get into prescription. I’m not talking about that. So I’m assuming that the State is not going to get into that either.”

Deputy Prosecutor: “That would be the State’s only point, your Honor, is to remind the defendant she can’t testify about or mention a prescription.”

Court: “Okay.” RP 158

Yokel therefore could have testified she put the pill in her pocket after giving one to her daughter. Or, she could have even said that it was the daughter's pill. But the defendant chose not to so testify. The only limitation placed on the defendant by the court was that the defendant could not mention that the pill was obtained via a prescription from a medical provider. RP 10, 17, 18, 158. Yokel could very well have testified as Appellant Counsel suggests; that Yokel was giving her daughter pills, decided to give her only one instead of two, and put the other in her pocket. But for some reason, the defense did not go into that line of questioning. The most probable explanation for this tactic was that the line of questioning Appellant Counsel suggests would have done more harm than good.

C. THERE WAS NO PROSECUTORIAL MISCONDUCT. THE STATE MERELY ARGUED THE BURDEN OF PROOF REQUIRED IN THE JURY INSTRUCTION OFFERED BY THE DEFENSE.

On page 19 of the appellant's brief, Appellant Counsel writes:

"Given that the prosecutor knew that Ms. Yokel could not talk about how she obtained possession of her daughter's medication, it was flagrant and ill-intentioned misconduct for the prosecutor to ask the jury to infer guilt based on the absence of such an explanation." Appellant's brief, page 19.

Appellant does not cite to any part of the record to support this. There is no such statement. The word "infer" is nowhere in the

State's closing argument. The State recognizes that hyperbole is a common literary device for conveying a written thought. But if you're going to accuse a deputy prosecutor of "flagrant" and "ill-intentioned" misconduct, you should at least supply an example.

Defendant offered WPIC 52.01 (the unwitting possession defense). RP 169. The State objected to the instruction, but the Court let it in as to Count II, possession of the hydrocodone pill. RP 173. All the deputy prosecutor did was argue the burden of proof in the instruction. RP 214.

In order for a prosecutor's statements to rise to the level of misconduct, they must be both improper and prejudicial. *State v. Sunberg*, Slip Op., Washington Supreme Court No. 91660-8 (March 3, 2016); *citing State v. Thorgerson*, 172 Wn.2d 438, 442, 258 P.3d 43 (2011). In a criminal prosecution, the State must prove the charge beyond a reasonable doubt. *Sunberg*, Slip. Op. at page 7. One exception to this rule is that if a defendant testifies about an exculpatory theory. *Sunberg*, Slip. Op. at page 7. The defendant bears the responsibility of proving an affirmative defense by a preponderance of evidence, and no error occurs where the prosecutor attacks such evidence or lack thereof. *Sunberg*, Slip. Op. at page 11.

Applying this to Ms. Yokel, her only limitation was that she was prevented from saying the pills were obtained via a prescription. She could have said she just kept a pill in her pocket when she was giving them to her daughter. She chose not to testify to that. All the deputy prosecutor argued was that Yokel did not meet her burden of proof. That hardly rises to misconduct.

D. THE TERM “NON-PRESCRIBED MOOD ALTERING SUBSTANCES” IS NOT UNCONSTITUTIONALLY VAGUE.

Everyone in the criminal justice arena knows that this term means controlled substances. I’ve been a lawyer since 1989, and a deputy prosecutor for eleven years. I’ve never seen a Community Corrections Officer violate anyone for possession of “coffee, tea, sugar, canned whipped cream, and cigarettes”, as the Appellant suggests. There’s absolutely no need to amend the judgment and sentence.

III. CONCLUSION.

The Appellant has misread RCW 69.50.4013. It is unlawful for a defendant to possess a controlled substance without a prescription to and for the defendant.

There was no prosecutorial misconduct because the deputy prosecutor simply emphasized the fact that the Appellant did not meet her burden of proof at trial.

Lastly, there is no need to modify the community custody conditions listed on the judgment and sentence. Community corrections officers know that the term "mood altering substances" means "controlled substances." The Appellant need not fear that she will be accused of violating her community custody conditions if she is in possession of a cup of sugar.

The Trial Court should be affirmed in all respects.

RESPECTFULLY submitted this 11th day of March, 2016.

JONATHAN L. MEYER
Lewis County Prosecuting Attorney

by: 
J. BRADLEY MEAGHER, WSBA 18685
Attorney for Plaintiff

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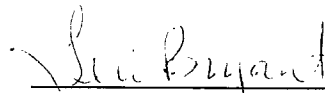
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DECLARATION OF SERVICE

Ms. Teri Bryant, paralegal for J. Bradley Meagher, Chief Criminal Deputy Prosecuting Attorney, declares under penalty of perjury under the laws of the State of Washington that the following is true and correct: On March 11, 2016, the appellant was served with a copy of the **Respondent's Brief** by email via the COA electronic filing portal to Lisa Tabbut, attorney for appellant, at the following email address: ltabbutlaw@gmail.com.

DATED this 11th day of March, 2016, at Chehalis, Washington.



Teri Bryant, Paralegal
Lewis County Prosecuting Attorney Office

LEWIS COUNTY PROSECUTOR

March 11, 2016 - 4:17 PM

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